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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1240

LOUIS LORENZA,

Petitioner,

vs.

THE CITY OF CLEVELAND

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO AND BRIEF IN SUPPORT THEREOF.

GASSAWAY, COLLUM & TYLER,
HAROLD T. GASSAWAY,
Of Counsel;
CONKLIN P. COLLUM,
EVERETT M. TYLER,
Counsel for Petitioner.

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LOUIS LORENZA,

Petitioner,

vs.

THE CITY OF CLEVELAND

PETITION FOR WRIT OF CERTIORARI WITH BRIEF

Louis Lorenza, petitioner, presents this his petition for writ of certiorari to be directed to the Supreme Court of the State of Ohio to review the judgment of that Court of December 20, 1944, wherein the petitioner's motion to certify was denied. On the 10th day of January, 1944, the State Supreme Court of Ohio denied petitioner's application for a rehearing. These judgments of the Supreme Court of Ohio affirmed the judgment of the trial court (Municipal Court of Cleveland) convicting the petitioner of a misdemeanor, thereby ruling in favor of respondent and against the petitioner.

Statement of Matter Involved

Three (3) police officers, without a search warrant, forcibly broke into the *bona fide private dwelling* of the peti-

tioner and searched the entire premises. No one was at home at the time of the breaking and entering nor during the time of the search. The petitioner returned to his home after the officers had confiscated personal correspondence addressed to and received by the petitioner through regular postal channels at the address where the search was conducted. They also seized a quantity of so-called "clearing house slips." These slips of paper are reputedly memoranda used in the conduct of a "lottery" or "schemes of chance". Their physical description is similar to that of race-horse slips only being larger in dimension. Bound in notebook form they are used by members of the Cleveland Police Department for recording conversations and evidentiary incidents in making arrests.

The legislative body of the City of Cleveland has enacted an ordinance making the possession of these slips a misdemeanor, if used, or are intended to be used in the promotion of a lottery. Section 2978-1 of the Municipal Code of Cleveland reads as follows:

> "It shall be unlawful for any person to have in his possession, or in his custody, or under his control, any ticket, check, writing, slip or document, which represents or is a memorandum of, or is evidence of, or is intended to be used as a memorandum or evidence of, or which is designed or intended to be used in the process of making, settling, paying, registering, evidencing or recording, a number of shares or an interest in a lottery "policy" or scheme of chance, by whatever name, style, or title denominated or known, whether located or to be drawn, paid, or carried on within or without this City".

The petitioner was placed under arrest *after* the search and seizure and an affidavit filed against him in the Criminal

Branch of the Municipal Court of Cleveland. The affidavit read as follows:

11th day of February, 1944.

"Louis Lorenza did unlawfully have in his possession, or in his custody, or under his control, certain slips, which represents, or is a memorandum of, or is evidence of, or which is designed to be used in the operation of making, settling, paying, registering, evidencing or recording an interest in a certain scheme of chance, to-wit: "clearing house".

Prior to trial and within the time limit prescribed by law, the petitioner filed a formal motion to suppress the evidence and for return of the papers and other personal belongings seized. A copy of this motion was duly served upon the City Prosecutor.

On the day of the trial all the witnesses including the defendant were sworn. Your petitioner, through counsel, requested of the trial court an oral hearing and the taking of testimony and the granting of his motion to suppress the evidence and for the return of his possessions. This request was summarily denied and the motion summarily overruled (R. 4). The defendant's conviction by the use of the articles seized by the officers, followed.

Three (3) courts of this state have had this case for judicial determination.

The trial court is the only one who did not apply the doctrine of "confession and avoidance" (admitting the existence of the facts but avoiding the issue).

The Supreme Court of Ohio said (without written opinion) "no debatable constitutional question" (R. 35).

The Court of Appeals of Cuyahoga County said (without written opinion) "judgment of the trial court affirmed."

The original trial court (without written opinion) made the following observation: "Now, I have to refuse your

motion to suppress. I don't care to hear arguments about it. You have a right of appeal if you want to, but the Supreme Court of Ohio has twice said what I think is sacrilege to the Constitution of the United States, but they said it. So, I know I will have to overrule your motion " (R. 6).

The Trial Court in making this statement was referring to and following the latest pronouncement of the Ohio Supreme Court in *State* v. *Lindway*, 131, O. S. page 166, wherein the highest court in this state held,

Syllabus 1,

> "The Fourth and Fifth Amendments to the Constitution of the United States, prohibiting unreasonable searches and seizures and compulsory self-incrimination, are directed exclusively against the activities of the Federal Government and have no application to the various states and their agencies."

Syllabus 3,

> "An officer of the law who makes search and seizure in a dwelling or other premises, without a warrant or with an illegal warrant, in contravention of Section 14, Article 1, of the Constitution of Ohio, is a trespasser, and amenable to an action for such trespass."

Syllabus 4,

> "In a criminal case, evidence obtained by an unlawful search is not thereby rendered inadmissable, and if otherwise competent and pertinent to the main issue, will be received against an accused."

Syllabus 6,

> "The immunities from compulsory self-incrimination and unreasonable searches and seizures given by Section 10 and 14, respectively, Article 1, of the Constitution of Ohio, are not violated by the denial of such application or motion, and the admission of such evidence."

The Supreme Court of Ohio in handing down this opinion was divided within itself. Three of the six participating Justices concurred in the judgment alone but drastically dissented from their other three colleagues in their application and interpretation of the Law. They concurred in the judgment solely because of the fact that in the Lindway case, the premises searched, *were not a bona fide private dwelling.* Judge Jones who wrote the dissenting opinion made this pertinent observation:

> "On the Constitutional question involved, the Supreme Court of the United States has consistently held adversely to the law, *as made for Ohio in the Lindway case.* This the majority opinion concedes. It also concedes that the language of the Federal Constitution pertaining to search and seizure is almost exactly similar to that employed in our own. Many courts have alluded to the fact that the federal provisions relating to search and seizure are the parent of the state constitutions, whose provisions were taken from the federal. It has always been the rule of statutory construction that, when a state adopts the language employed in a federal statute, *the construction given by the United States Supreme Court will be regarded as persuasive, if not controlling, upon the state court.*"
>
> "There are millions of homes in our state occupied by law-abiding citizens. They have a right to the protection guaranteed them by our Constitution and state laws. They should not be deprived of their constitutional protection simply because a few, commonly called public enemies of society, bent on the destruction of life and property, demand the same constitutional immunity as a law-abiding citizen. In my judgment, there is a way out, a judicial common-sense method of meeting the legal problems presented in this instant case. I would not place the innocent householder or one suspected of a minor offense upon the same plane as he who plans major crimes such as commercial kidnapping, the destruction of life or property, or

who engages in treason against the state and federal governments." (Underscoring ours.)

This Court Has Jurisdiction

It is contended here that the Supreme Court of the United States has jurisdiction to review the judgment herein because;

1. The federal constitutional issues have been preserved and are properly presented to this court for determination.
2. The state court has decided the federal question of substance not heretofore determined by the Supreme Court and has decided it in a way not in accord with the applicable true doctrine of similar decisions of the United States Supreme Court.
3. The writ is directed to the proper judgment and the relief sought is proper for the party in this case.

The denial of a fundamental right or immunity guaranteed by the Constitution of the United States and of the State of Ohio if acquiesced in by the highest court of the State, the presentation of that acquiescence to the United States Supreme Court should and must pose jurisdiction in the United States Supreme Court, else the quēstion of jurisdiction becomes a subtle lever to pry loose the foundation of national freedoms.

Lovell v. *City of Griffin, Ga.*, 58 U. S. 666.

"Wherever a question of violation of the defendant's constitutional rights are adequately presented and are decided in the State Court is itself a Federal question as respects the Supreme Court *jurisdiction.*" (Underscoring ours.)

Broad River Power Co. v. *South Carolina*, 281 U. S. 537.

"Wherever a State Court has denied to rights asserted under local law, the protection which the Con-

stitution guarantees, is a question upon which the petitioners are entitled to invoke a judgment of this court and even though the constitutional protection invoked be denied on non-federal grounds, it is the province of this court to inquire whether the decision of the State Court rests upon a fair and substantial basis."

Ashcraft v. *City of Tenn.*, 322 U. S. 143—

"Where defendants applied for certiorari on ground that their convictions were based on confessions which were extorted from them by State law enforcement officers in violation of United States Constitutional Amendment 14, the contention raised a federal question and the United States Supreme Court was bound to make an independent examination of the defendant's claim which duty could not have been foreclosed by finding of the Court, or verdict of jury, or both.

25 Corpus Juris, 934 & Note, —

"A claim that a state is, in violation of the Federal Constitution depriving of life, liberty or property, without due process of law, or is attempting to do so, is sufficient to support a review by the Supreme Court unless such claim is frivolous, unsubstantial or contrary to the law as established by prior decisions of the Supreme Court."

Sec. 333 Loveland on Appellate jurisdiction of Federal Courts, pg. 713:

"The Supreme Court has jurisdiction to review a judgment or decree of the highest court of the state denying the claim of plaintiff in error after he had been deprived of property (or liberty) without due process of law or had been denied the equal protection of the law guaranteed by the Constitution."

The petitioner has been denied the following immunities and guarantees;

(a) The Fourth Amendment to the Constitution of the United States prohibiting unlawful searches and

seizures without a warrant and guaranteeing him the security and sanctity of his person and home.

(b) He has been denied the protection of the Fifth Amendment of the Constitution of the United States in the denial of the right of due process of law and by being required in a criminal case to be a witness against himself.

(c) He has been denied the rights as conferred on him by the Fourteenth Amendment to the Constitution of the United States which extends to the people within their several states the limitations against the denial of life, liberty or property, without due process of law.

The petitioner has also been denied the protection of, Article 1, Section 14 of the Constitution of Ohio, which provides;—

"The right of the people to be secure in their persons, houses, papers and belongings against unlawful searches and seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath of affirmation, particularly describing the place to be searched, and the person and things to be seized."

Article 1, Section 10 of the Constitution of the State of Ohio, includes a provision that;

"No person shall be compelled in a criminal case, to be a witness against himself."

Article 1, Section 16 of the Constitution of the State of Ohio guarantees to every citizen of the State the right to due process of law.

American Sugar Refining Co. v. *State of La.*, 45, Law Ed. (U. S.) 102.

"A motion to dismiss must be denied where the protection of the Fourteenth Amendment is invoked in the

answer, and the defense is at least plausible upon its face."

Loveland on Appellate Jurisdiction of Federal Courts, Sec. 333, pg. 714:

> "If the plaintiff in error has invoked the protection guaranteed by the Fourteenth Amendment and the claim was plausible on its face, the denial of that claim clearly gives the Supreme Court jurisdiction. The power of that court to revise the final decree of judgment of the state court in that respect does not depend upon whether the decision of that court was erroneous it is only necessary that the state court deny the claim. The inquiry on a motion to dismiss a writ of error is usually whether a claim, as asserted, states the case within the protection guaranteed by the amendments and therefore raises the Federal question."

To summarize our jurisdictional claim we earnestly say that not only this petitioner, but every citizen in the State of Ohio is therefore being prevented from asserting his rights to be secure from unlawful searches and seizures. The Supreme Court of Ohio by denying a hearing to the petitioner, reaffirmed the law in Ohio as announced by that very body, to the effect that the previous determinations by the United States Supreme Court on search and seizure have no effect on any citizen of this State regardless of the existence or non-existence of a warrant; regardless of whether the suspected offense is a felony or a misdemeanor and regardless to whether or not the invading officers had previous existing knowledge of the commission of an offense or knew of the existence of probable cause.

Counsel for petitioner has thoroughly examined the authorities with particular respect to the provisions of the 4th and 5th Amendments of the United States Constitution on the conduct of non-Federal officers. We have noted the

many factual distinctions that have appeared in the leading cases, notably in;

Weeks v. *U. S.*, 232 U. S. 383;
Silverthorn Lumber Co. v. *U. S.*, 251 U. S. 385;
Agnello v. *U. S.*, 269 U. S. 20;
People v. *Defore*, 270 U. S. 657.

Justice Cardozo in his opinion in *People* v. *Defore* brings to our attention the fact that;

> "Fourteen states have adopted the rule of the Weeks case, either as there laid down or as subsequently broadened; thirty-one have rejected it. With authority thus divided, it is only some overmastering consideration of principle or policy that should move us to a change. The balance is not swayed until something more persuasive than uncertainty is added to the scales."

We most respectfully submit to this Honorable Court that when the Supreme Court of a State goes so far in an opinion as to say for all time, that there can be no protection whatsoever, State or Federal, against unreasonable searches and seizures of a private dwelling without a warrant and where this record does not disclose any real or fancied pretext for the breaking into a bona fide private dwelling; that therefore *no more overmastering consideration of principle or policy could be presented to this Court.*

In furtherance thereof, we might briefly list factual distinctions, some of which appeared at some time in each of the United States Supreme Court cases above alluded to;

(1) The premises searched were without dispute a bona fide dwelling.

(2) The petitioner was not home at the time the officers broke and entered.

(3) The search and seizure was not conducted as an incident to an arrest.

(4) The offense for which the defendant was eventually convicted was the possession (not on his person but in his home) of "clearing house slips". A misdemeanor, under a Municipal Ordinance.

Our State Supreme Court has seen fit to declare the Fourth Amendment to the Constitution of the United States and Article 1, Section 14 of the Constitution of the State of Ohio, void of all future force and effect. This, again we repeat surely should require this Honorable Court to at least give the citizens of Ohio an opportunity to have this confusion quieted and to have this overmastering consideration of principle and policy determined on their behalf by the one remaining judicial appellate body of the United States, available to them.

The Questions Presented

1. The Federal question of substance and not heretofore determined by this court is on the rights of citizens of this state to the protection of the Federal and State Constitutional provision against unreasonable searches and seizures when the highest court of the State holds that the only remedy against the violation of these provisions lies in a Civil action for trespass.

2. Has the petitioner been denied due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution; said guarantee being imposed as a duty on the governments of the several states and being ratified by Ohio in Article 1, Section 10 of the Constitution of Ohio, when the Court of final resort in this State, takes the position that no debatable constitutional question has been presented in the instant case?

Reasons Relied On for Writ

A substantial Federal question presents itself with respect to the scope of State judicial limitation, abridgement and denial of the right to be protected against unreasonable

searches and seizures and the right of citizens to have due process of law to insure their right to be secure in their persons, possessions and homes.

So far as the petitioner is informed this case presents for the first time the question as to whether State Courts in their determination of the law in the several States may establish an immutable, inflexible standard that denies the people of that State *any* constitutional immunity or priviledge.

Section 13430-3 of the General Code of Ohio provides:

> "No warrant of search or seizure shall issue but upon probable cause supported by oath or affirmation particularly describing the place to be searched and the property and things to be seized."

Mauer on Constitutional Law (Fed. System), pg. 1-3

> "Of lesser import, and pertaining to the framework of government, is the dual nature of the American System, described as the Federal System, with a division of government into two spheres State and National * * * and all powers were reserved to the State governments except those concerning matters of national scope, control of which was expressly or impliedly delegated to the National government. This division of the spheres of government into State and National has been the basis for many significant cases in Constitutional law. Each State Constitution is the supreme law of the state, but over all is the Constitution of the United States in which is contained a provision of far reaching significance, namely that "this Constitution and all laws and treaties made in pursuance thereof, *shall be the supreme law of the land.*" (Italic ours.)

It has been held by this Court that a Federal question is raised where the claimed violation of the defendant's con-

stitutional rights has been passed on by the highest court in the State.

Myles Salt Company v. *Iberia Drainage Dist.*, 329, U. S. 478, 484.

> "It is true the law of the state as written is not attacked but the law as administered and justified, by the Supreme Court of the State is attacked and it is asserted to be violative of the Constitution of the United States. The question presented is Federal."

Frankfurter & Fisher, 51 Harvard Law Review, pg. 577-595.

> "The Supreme Court will intervene either to quiet a conflict which it alone can compose, or to disclose the law when the intrinsic importance of an issue calls for its most authorative determination."

The Supreme Court of the State of Ohio in the instant case following its own pronouncement in *State* v. *Lindway* has so far departed from the accepted and usual course of judicial proceedings and so far sanctions such a departure by a State Tribunal as to call for the exercise of the Supreme Court power of supervision.

United States v. *Bell*, 48 Fed. Supp.

> "A substantial Federal question presents itself with respect to the scope of State judicial denial to its citizens whatever the kind or nature of the suspected offense, the right to be secure in their papers and possessions."
>
> "The taking away of the procedural remedy of suppression and return of the papers so seized in effect repeals those constitutional provisions given as a protection."

Synder v. *Massachusetts*, 291 U. S. 976.

> "The State is free to regulate procedure of its courts in accordance with its own conception of policy unless

in so doing, it, "offends some principle of justice so rooted in the traditions or the conscience of our people as to be ranked fundamental."

An analysis of the present state of the law in Ohio clearly shows material and substantial restrictions on the operation of three (3) distinct Federal and State Constitutional provisions. The decision in this case should determine whether such usurpation of power may be exercised by State Courts.

WHEREFORE, your petitioner prays that a writ of certiorari issue out of and under the Seal of this Court to the Supreme Court of Ohio, to the end that your petitioner may have such further relief as may be proper.

Respectfully submitted,

GASSAWAY-COLLUM & TYLER,
HAROLD T. GASSAWAY,
Of Counsel;
CONKLIN P. COLLUM,
EVERETT M. TYLER,
Counsel for Petitioner.

In conclusion let us quote an observation made by the Honorable Walter B. Kennedy in his treatise found in, "My Philosophy of Law", a publication of the Julius Rosenwald Foundation.

> "I believe the doctrine of *inalienable rights* which form the core of the Declaration of Independence more accurately expresses the American way of life than institutional behavior * * *." (Italics ours.)

These given rights are inalienable. These rights should ever remain inalienable. The jealousy of the State of their privileges should not be used as an excuse to avoid the fundamental and substantial principles of constitutional law.

Juristic faith and juristic necessity must prevail. The people have faith, will always have faith in the nine men who sit as the ultimate protectors of their basic constitutional rights.

There has been much discussion in this petition about the *State of Ohio* v. *Lindway*, 131, O. S. 166. We have alluded frequently to the dissenting view written by Justice Jones. May we in conclusion give you a few more excerpts:

> "Upon the substantive law of the case, the majority opinion states that, "because of the uncertainty existing in our decisions * * * it would seem both wise and necessary to lay down a definite rule, etc.," * * * There is no uncertainty in our decisions. Never has our court indicated that a search of a bona fide dwelling could be made without a search warrant. And, if there were any uncertainty, the rule has been definitely established by our court in Nicholas vs. City of Cleveland, 125 Ohio St. 124 * * *" which held:
>
> > "That a search of a private dwelling cannot be made without a statutory warrant issued in compliance with Section 13430-3, General Code. That

case was concurred in by every judge who participated. Later, in Browning vs. City of Cleveland, 126 Ohio St. 285, the Nicholas case was definitely approved and concurred in by every participating judge."

"The pronouncements made in propositions 4 and 5 of the syllabus to the effect that the court need not concern itself with the collateral issue of how the evidence is procured and that such evidence was admissible under an unlawful search, are denounced by the federal and many state courts. Were the law to be applied to cases where search warrants are obtained before search, then I could agree that a court need "not concern itself with the collateral issue of how the evidence was procured." This is readily understandable; but to apply the principle to cases where no search warrant has been issued is an indirect method of validating unlawful searches and seizures which the Constitution prohibits."

"A civil suit might furnish the housewife some relief against an officer if he be under bond; but if the search and seizure be made by a thief or robber impersonating an officer, the amount of damages recovered would probably be nil. If her goods were recovered and she were religious, she could thank God for their recovery. This might furnish some consolation for her distress. I fear that this decision will yield a fertile field of operations to the criminal element, should it learn that a dwelling may be searched without a warrant."

To summarize our contention and argument, we believe;

1. Under the statement of the matter involved we believe the facts are sufficiently clear to indicate to this Honorable Court that your petitioner's Constitutional rights have been invaded.

He has interposed three Federal and three State Constitutional provisions, the violation of which he claims entitles him to his petition for a writ of certiorari.

2. He has preserved and presented each Constitutional question in each court of appellate jurisdiction.

3. He has shown the need of and reason for the assumption of jurisdiction by the United States Supreme Court.

4. His cause presents a Federal question of substance involving the rights, not only of this petitioner but of all the citizens of the State of Ohio who have lost their constitutional assurances, through no fault of their own, but through a false judicial philosophy that has developed within this State and that will undoubtedly remain within this State until the Supreme power of this Body is invoked to rationalize that philosophy.

Freedom of the press, freedom of speech, the right of peaceable assemblage and the right to equal electoral suffrage are again being preserved by the highest tribunal in the land.

The other freedoms should be none the less warily guarded. Guarded with caution, but actively guarded.

The freedoms of speech, press, assemblage and franchise are no more fundamental and vital than the freedom to live in one's home without the constant fear of invasion by those who excuse that invasion by color of authority.

The Supreme Court of the State of Ohio has said, in effect; "If your home has been invaded without a warrant, if your home has been searched, if your person, papers and belongings have been seized and used in evidence against you; if you have been convicted for the possession of those articles so seized; if you have been denied the right to have the courts of this State inquire into that entry and search and seizure—We, the Supreme Court of Ohio are powerless to help you. We do not find any debatable constitutional question."

We submit therefore, that this Court has jurisdiction. We submit that this case definitely presents a Federal question.

We submit the reasons relied on for the granting of this petition for a writ of certiorari are sound, substantial and fundamental.

Respectfully submitted,

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Petitioner,

vs.

THE CITY OF CLEVELAND,
Respondent.

BRIEF OF THE RESPONDENT CITY OF CLEVELAND OPPOSING PETITION FOR WRIT OF CERTIORARI.

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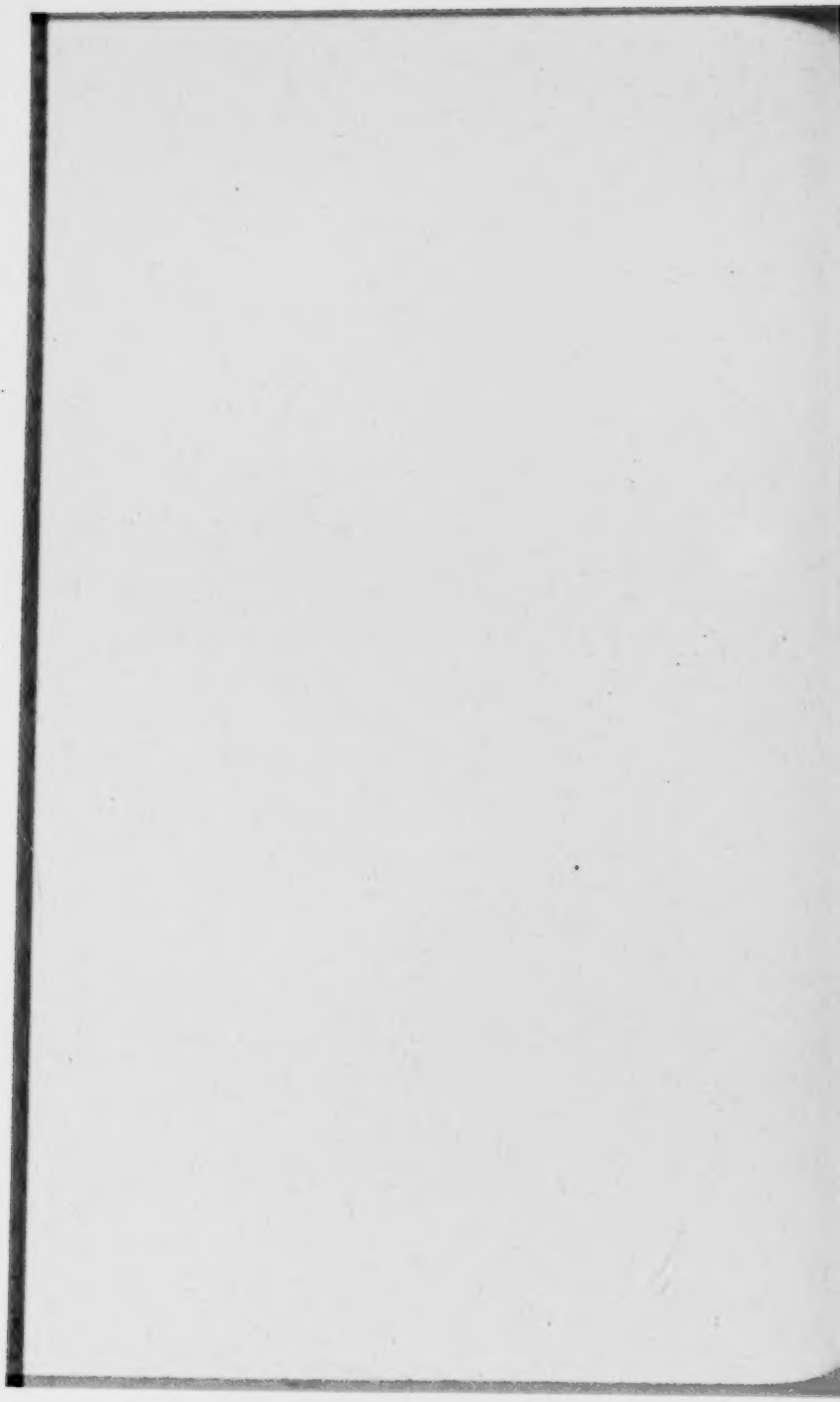

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LOUIS LORENZA,
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THE CITY OF CLEVELAND,
Respondent.

BRIEF OF THE RESPONDENT CITY OF CLEVELAND OPPOSING PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

The petitioner was arrested and charged with unlawful possession, custody or control of certain slips representing memorandum of, or evidence of settling, paying, registering, or recording an interest in a certain scheme of chance, to-wit: clearing house, in violation of Section 2978-1 of the Municipal Code of Cleveland, which ordinance makes it a misdemeanor for a person to have in his possession, or in his custody, or under his control, such slips, tickets, documents, etc.

At the trial of the case such slips were presented in evidence and said slips were obtained by policemen of the City of Cleveland when they entered premises in a multiple apartment house without a search warrant. Large quantities of said slips were found on the premises and it appears at points in the record that the defendant's attorney by cross-examination sought to show that the premises were not the residence of the petitioner but of some other person.

Before trial the petitioner filed a motion to suppress the evidence on the grounds that it was obtained in course of an unlawful search and seizure and without warrant. Petitioner complains that he sought to offer evidence on the question of the unlawful search and seizure and was denied this right. We question this claim as we do not believe that the record shows that the petitioner attempted to present any evidence on his motion. The court was fully aware of the facts relating to the seizure, however, and undoubtedly assumed that any statement that counsel for petitioner made as to seizure without warrant was true when he made his ruling based on the decision of the Supreme Court of Ohio which approves of the admission of evidence so obtained. (*State vs. Lindway*, 131 O. S. 166.)

After petitioner's motion was overruled the court proceeded with the trial and the petitioner, the defendant therein, rested without offering any evidence. He was thereupon found guilty. The Court of Appeals affirmed the judgment and the Supreme Court of Ohio refused a motion to certify and dismissed an appeal as of right on the grounds that there was no debatable constitutional question. That entry indicated that so far as the courts of Ohio were concerned the questions involved had been decided.

QUESTIONS PRESENTED.

The petition for writ of certiorari makes reference to a great many points but at page 11 of the printed petition the questions presented to this Court are summarized and may be briefly stated as follows:

1. The right of citizens to the protection of the federal constitutional provision against unreasonable searches and seizures.

2. Was the petitioner denied due process of law as guaranteed by the 14th amendment to the United States Constitution?

Since the petitioner has specifically stated his propositions in this manner, we assume that they are the only propositions that this Court will consider and we therefore will confine our brief to these propositions.

> "1. Review by certiorari is limited to the grounds upon which the writ was sought and allowed. A ruling to which there was but a mere reference in the petition, without request for review, not considered." (*Connecticut Railway & Lighting Co. v. Palmer et al., Trustees*, 305 U. S. 493.)
>
> "1. Review by certiorari is confined to questions specifically brought forward by the petition for the writ. (p. 177.)
>
> The supporting brief is not a part of the petition for this purpose; specifications of error in that brief do not expand or add to the questions stated in the petition; they serve merely to identify and challenge rulings upon which is grounded ultimate decision of the matter involved." (p. 178.) (*General Talking Pictures Corp. vs. Western Electric Co.*, 304 U. S. 175.)

We further assume that the petition for a writ is brought under paragraph (b) of Section 237 of the judicial code, 28 U. S. C. A. Section 344 and specifically under that part of paragraph b which provides that it shall be competent for the Supreme Court by a writ of certiorari to require the highest court of the state to certify its record where there is drawn in question any right, privilege or immunity specifically set up or claimed by either party under the constitution.

THE COURT LACKS JURISDICTION AS THE CONSTITUTIONAL QUESTION WAS NOT NECESSARILY DECIDED BY THE STATE COURT AND THE FEDERAL QUESTION AS PRESENTED WAS NOT PROPERLY PRESERVED.

This case was tried before the Municipal Court of Cleveland. An appeal from said court lies directly to the state Court of Appeals and the state Court of Appeals under our Ohio law is generally speaking a court of last

resort. Under the constitution and laws of the State of Ohio the Supreme Court of the State of Ohio reviews only such cases as involve constitutional questions or involve matters of great public and general interest. In the case at bar the Supreme Court of Ohio never passed upon the merits of this case. Therefore, the decision of the Court of Appeals is in reality the decision of the highest court of the state. After judgment was entered in the Court of Appeals, the petitioner made application to the Supreme Court by way of filing a motion to certify in that court and also filed an appeal as of right. The motion to certify was overruled and the appeal as of right was dismissed on the grounds that the case did not involve any debatable constitutional question.

It therefore becomes important to examine the record and ascertain exactly what questions were presented to the Court of Appeals.

The Assignment of Errors filed with the Court of Appeals is as follows:

1. Court erred in overruling defendant's motion to suppress the evidence.

2. Court erred in overruling the motion to suppress the evidence without hearing any testimony in support of said motion.

3. The defendant has been convicted without due process of law, in violation of his constitutional rights and immunities.

4. The ordinance under which the defendant was charged and convicted is unconstitutional in that, it presumes guilt, in violation of defendant's constitutional rights.

5. Other irregularities appearing on the face of the record in the proceedings, and at the trial, which appellant could not guard against and which vitiated said proceedings, ousted the Court of its jurisdiction, and prevented this appellant from having a regular and fair and impartial trial according to the due course of the law.

Now in order to determine what constitutional rights the petitioner claims were violated let us examine his brief in the Court of Appeals and see what propositions were urged upon the court. Their brief is subdivided as Argument I, II and III.

No argument was advanced in support of Assignment of Error No. 4 as to the ordinance being unconstitutional. Summarizing "Argument No. 1," it is a complaint that the trial court refused to hear evidence on a motion to suppress the evidence and it is contended that by the court's refusal in this respect the defendant was denied his constitutional right and has been convicted without due process of law in violation of Article I, Section 10 and Section 16.

This is definitely a reference to the Constitution of Ohio and not to the federal constitution.

In "Argument 2" the appellant complained that there was a lack of evidence as to what was a clearing house slip.

In "Argument 3" it is contended that there was an entire failure of proof and that the verdict could not be sustained in law or fact and was manifestly against the weight of evidence.

The only definite complaint on constitutional grounds was therefore to the effect that refusal to hear evidence on a motion to suppress evidence violated Article I, Sections 10 and 16 of the Ohio Constitution.

The decision of the Court of Appeals was, as we stated before, of the highest court of Ohio on the merits of the case. When the petitioner sought a review and an appeal of the case in the Supreme Court of Ohio he filed a notice of appeal as of right on questions of law only on the grounds that the case involved questions arising under the constitution of Ohio and the United States. This is the first point at which we find a mention of the constitution of the United States. At the same time he also filed a motion to certify with the Supreme Court of Ohio and with said

motion to certify the appellant filed his assignments of error and they are listed as follows:

> "Now comes the defendant-appellant and respectfully files the following assignments of error in this Court:
>
> (1) Court erred in overruling the motion to suppress the evidence.
>
> (2) Court erred in overruling the motion to suppress the evidence without hearing any testimony in support of said motion.
>
> (3) The defendant has been convicted without due process of law, in violation of his constitutional rights and immunities.
>
> (4) The ordinance under which the defendant was charged and convicted is unconstitutional in that, it presumes guilt, in violation of defendant's constitutional rights.
>
> (5) Other irregularities appearing on the face of the record in the proceedings, and at the trial, which appellant could not guard against and which vitiated said proceedings, ousted the Court of its jurisdiction and prevented this appellant from having a regular and fair and impartial trial according to the due course of the law."

In petitioner's brief in the Supreme Court of Ohio we find only two definite references to the constitution of the United States, first is on page 11. It is stated:

> "We believe sincerely that the construction and interpretation of the 4th and 5th Amendments of the Federal Constitution and Section 14, Article I of the Constitution of the State of Ohio as expressed by Judge Jones in his *Lindway* opinion, entitle this defendant to his Motion to Certify."

The above quotation impresses us with the idea that petitioner is vainly attempting to secure a review of the *Lindway* case (*State vs. Lindway*, 131 O. S. 166—decided by S. C. of Ohio May 27, 1936) rather than the case at bar.

The second reference to the constitution of the United States is found in that part of the Ohio brief captioned "Error Complained Of" beginning on page 7 of that brief. This paragraph on errors complained of may be summarized as follows:

First, "has the defendant's security in his person, house, papers and possessions been violated by the unreasonable search and seizure as guaranteed by the Fourth and Fifth Amendments to the Federation Constitution and Section 14, Article I of the Constitution of the State of Ohio?" Second, "Was the defendant's constitutional right violated by the denial by the trial court of an oral hearing on his Motion to Suppress the Evidence as indicated in the record?" Third, the substance of the third error being the question as to whether a supplemental and later adopted section of the gambling ordinances of the City of Cleveland made it necessary to prove that the confiscated clearing house slips were not a lottery for a charitable or benevolent purpose. It is to be noted that up to this point there has been no mention of the Fourteenth Amendment to the Constitution of the United States which is the second question that is being presented to the Supreme Court of the United States.

If we assume that a violation of the Fourth and Fifth Amendments to the Constitution of the United States was properly presented to any of the Court of Ohio, there is still no federal question involved. There was no federal offense charged. There was no search or seizure or arrest by any federal officer. There was no trial in a federal court. The search and seizure was by local policemen, officers of the City of Cleveland. This Court has repeatedly held that the Fourth and Fifth Amendments to the Constitution of the United States are not directed against local or state officers, but against federal officers. They are provisions to protect the people of the various states against instrusions by federal officers and officials and prevent

federal courts from compelling a man to be a witness against himself or depriving him of life or liberty without due process of law.

The *Weeks* case is one of the early cases in this respect and in that case it was held:

> "The fourth Amendment is not directed to individual misconduct of state officers. Its limitations reach the federal government and its agencies."
>
> *Boyd vs. U. S.*, 116 U. S. 616 (*Weeks vs. United States*, 232 U. S. 383).

This Court has also made some fine distinctions and permitted the use of evidence obtained by unreasonable search in trials in the federal court where the unreasonable search or seizure was not actually made by the federal officers.

In the case of *Burdeau vs. McDowell*, it was held that constitutional guaranties against unreasonable searches and seizures and self-incrimination will not be violated if the Federal prosecuting authorities had no part in the wrongful taking. (See syllabus 1.) Second syllabus is as follows:

> "2. The security afforded by the U. S. Const. 4th Amend., against unreasonable search and seizure, applies solely to governmental action. It is not invaded by the unlawful acts of individuals in which the government has no part." (256 U. S. 465.)

This distinction seems to be followed to the present moment by this Court as we find a similar holding in the case of *Feldman vs. United States*, decided May 29, 1944 and reported in 322 U. S. 487 which holds as follows:

> "The Fifth Amendment does not forbid the use in evidence against a defendant in a criminal case in a federal court of self-incriminating testimony theretofore compelled—under a state immunity statute and without participation by federal officers—in proceedings in a state court."

The *Feldman* case reviews the history of this type of case and apparently it cites with approval the cases we have heretofore mentioned in our brief.

In the case of *Adams vs. New York*, 192 U. S. 585, we have a case involving policy slips and very similar to the case at bar. In that case the law of New York made the mere possession of any paper or document representing a recording of or an interest in the game of numbers or chance a misdemeanor. Likewise, the evidence was obtained by raid of the defendant's premises against his protest without his consent and he claimed that his constitutional right to be secure in his person and papers was violated and that he was compelled to be a witness against himself in contravention of the Fourth and Fifth and Fourteenth Articles of Amendments to the Constitution of the United States. (See page 587.) In the *Adams* case this Court held as follows:

> "The fact that papers, which are pertinent to the issue, may have been illegally taken from the possession of the party against whom they are offered is not a valid objection to their admissibility. The court considers the competency of the evidence and not the method by which it was obtained.
>
> "There is no violation of the constitutional guaranty of privilege from unlawful searches and seizures in admitting as evidence in a criminal trial, papers found in the execution of a valid search warrant prior to the indictment; and by the introduction of such evidence defendant is not compelled to incriminate himself.
>
> "It is within the established power of a State to prescribe the evidence which is to be received in its own courts. The provisions of Sections 344a, and 344b, of the Penal Code of New York making the possession of policy slips by a person other than a public officer presumption of possession knowingly in violation of law are not violative of the Fourteenth Amendment, are not unconstitutional as depriving a citizen of his liberty or property without due process of law, and

do not, on account of the exception as to public officers, deprive him of the equal protection of the laws.

"A suggested construction of a state statute which would lead to a manifest absurdity and which has not, and is not likely to receive judicial sanction, will not be accepted by this Court as the basis of declaring the statute unconstitutional when the courts of the State have given it a construction which is the only one consistent with its purposes and under which it is constitutional."

Some of the cases we have just cited speak more specifically of the Fourth Amendment only. Some of the earlier cases dealt specifically with the Fifth Amendment. In *Thorington vs. Montgomery*, 147 U. S. 490 the first syllabus definitely holds as follows:

"The Fifth Amendment to the Constitution operates exclusively in restriction of Federal power, and has no application to the States."

In *Maxwell vs. Dow*, 176 U. S. 581, it was held as follows:

"The privileges and immunities of citizens of the United States do not necessarily include all the rights protected by the first eight amendments to the Federal Constitution against the powers of the Federal Government."

Returning now to the specific questions presented for consideration of this Court by petitioner's brief (page 11) the first question presented is whether the seizure by city officials of policy or clearing house slips and the admission of the same in evidence in the trial in a municipal court violates the Fourth or Fifth Amendment.

The cases we have cited definitely indicate that the Fourth and Fifth Amendment are not restrictions against local officers and therefore there can be no question raised under the constitution of the United States with respect to these two amendments.

Question No. 2 presented is, has his privileges and immunities as a citizen of the United States been abridged and whether he has been deprived of liberty or property without due process of law or whether he has been denied the equal protection of the law. It must be concluded that the immunity that he is claiming under the Fourteenth Amendment is, that against unreasonable search and seizure guaranteed by the Fourth Amendment, and the right not to be compelled to be a witness against himself or deprived without property or due process of law as guaranteed by the Fifth Amendment. Since the Fourth and Fifth Amendments are restrictions of the power of the federal government only, his claim of violation of the Fourteenth Amendment must fail. Furthermore a violation of his rights under the Fourteenth Amendment to the Constitution of the United States was not presented to the State Court.

We have previously pointed out that a federal question was not definitely or specifically presented to the Court of Appeals which was the court of last resort on the merits of this case. We have pointed out that petitioner's claims of the federal question as raised by his appeal to the Supreme Court of the United States are based upon violation of the Fourth and Fifth Amendment to the Constitution of the United States and that these amendments are restrictions on federal power. It seems evident therefore that a federal question was not necessarily decided by the Court of Appeals, even if we assume that it was presented, it was not necessarily decided by the Supreme Court of Ohio when it overruled a motion to certify and denied an appeal as of right. We think it was obvious under the circumstances that a decision of the federal question was not necessary to a determination of the cause. In view of this, we feel that the case of *Honeyman vs. Hanan, Executor*, 300 U. S. 14 is controlling and the Court cannot take jurisdiction of the case at bar.

"1. To constitute jurisdiction over an appeal from a state court, it must appear, affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause."

CONCLUSION.

While we feel that the question of constitutionality of the ordinance is not presented to this Court, we might mention that the ordinance is quite similar to the New York law passed upon in the *Adams* case. (192 U. S. 585—last syllabus.)

Petitioner suggests, by reference only, the unconstitutionality of the ordinance under the Constitution of the State of Ohio. In this respect we might mention that it was held constitutional so far as the Constitution of Ohio is concerned, in the case of *City of Cleveland vs. Weisberg*, 141 O. S. 625. An identical ordinance was held constitutional in the case of *City of Xenia vs. Smith*, 139 O. S. 169.

While we do not believe that the record shows that the defendant in trial court was denied the right to offer evidence on a motion, nevertheless we maintain that the best that can be made of the record is that the trial court in making the ruling was fully cognizant of the fact that there was a search of the premises without a warrant and that the evidence sought to be suppressed was obtained in course of this alleged unreasonable and illegal search. That would be the only evidence so far as we can see that was capable of being offered. These facts appear to be clearly in the court's mind in view of the things the court said about the *Lindway* case. (*State vs. Lindway*, 131 O. S. 166.) The ruling was undoubtedly made by granting and assuming that everything they claimed about the search was true by holding that the evidence was admissible under the *Lindway* case. When we examine the various briefs filed by petitioner in other courts and when we examine

the petition for certiorari filed herein together with petitioner's statement of facts and brief thereon, we are convinced that the petitioner is making a vain attempt to obtain a review of the *Lindway* case rather than the case at bar.

The federal question was not definitely presented to the courts in Ohio. It was not necessary to decide any federal question for determination of the matters involved. And since this was not a federal procedure and not a search and seizure by federal officers but by city patrolmen and use of evidence in a municipal court, the 4th and 5th Amendments to the Constitution of the United States are not involved and if these are not involved then there is no grounds for claiming a violation of the 14th Amendment of the United States. We contend that in the case at bar our State court has not decided a federal question of substance not theretofore determined by this Court, but if it has, the decision is in accord with applicable decisions of the Supreme Court of the United States.

Therefore, we submit that the writ of certiorari herein should be denied.

Respectfully submitted,

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